

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM,
INC., et al.,

Plaintiffs,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Defendants.

Civil Action No. 92-2247
(and Consolidated Cases
Civil Action Nos. 92-2292,
92-2494, 92-2495, 92-2558)

(SFW, TPJ, SS)

**PUBLIC BROADCASTERS DEFENDANT-INTERVENORS'
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 108(h), defendant-intervenors the Association of America's Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS"), and the Corporation for Public Broadcasting ("CPB") (collectively "the public broadcasters"), submit this memorandum in support of their motion for summary judgment on the constitutionality of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 535 (Supp. 1995).

The Supreme Court remanded this case for further consideration of the constitutionality of Sections 4 and 5 of the 1992 Cable Act (the "must-carry provisions"). Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994). The Court suggested that a determination of constitutionality could be based either on a "more substantial elaboration . . . of the predictive or historical evidence upon which Congress relied" or on the introduction of additional evidence. Id. at 2472. As we show below, the congressional record alone is sufficient to support the constitutionality of Section 5. While the Court need not go beyond the congressional record, additional evidence developed on remand confirms that summary judgment should be granted with respect to Section 5.

In Section 5, Congress imposed "must carry" requirements on cable operators with respect to noncommercial educa-

tional television stations. Carriage of public television stations pursuant to Section 5 serves the same substantial governmental interests that support carriage of commercial stations under Section 4, and should be upheld for the same reasons. However, in assessing the harm that would result from noncarriage of public television stations, Congress recognized that broader governmental interests are also at stake. That harm must be assessed in light of the importance of cable carriage to public television's mission to serve as a source of programming that provides an alternative to commercial television and to make that programming available to all Americans. As Congress recognized, that mission -- and the considerable governmental and public commitment that have helped to advance it over the last quarter century -- are especially threatened by cable's emergence as a bottleneck in the free flow of video information. Congress' enactment of Section 5 is therefore supported not only by the factors that support Section 4, but also by factors that relate specifically to public television.

The extensive record before Congress and the Federal Communications Commission ("FCC") showed that public television stations had suffered significant harm in the absence of must-carry rules and that they were likely to suffer additional harm if must-carry legislation were not enacted. The record further indicated that Section 5 would have a very limited impact on cable operators. Thus, while the public broadcasters fully

endorse the constitutionality of Section 4 and rely on arguments made in the briefs submitted by the federal defendants and the commercial broadcasters (NAB/INTV), they focus in this submission on the independent reasons to uphold Section 5.

STATEMENT

A. The Role of Public Television

Section 5 of the 1992 Cable Act was enacted against the backdrop of the federal government's long record of support for public television, with the goal of providing all Americans with alternatives to commercial television programming.

Congress repeatedly has found that public television serves an important purpose because "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."¹ To overcome this market failure, Congress and the FCC have worked together to fashion a system of locally oriented public television stations that would be "uniquely fitted" to offer "programs of high quality, obtained from diverse sources."² Just prior to passage of the 1992 Cable Act, Congress found in related legislation that

¹ H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967), reprinted in 1967 U.S.C.C.A.N. 1799, 1801.

² S. Rep. No. 222, 90th Cong., 1st Sess. 1 (1967), reprinted in 1967 U.S.C.C.A.N. 1772, 1779; see generally 47 U.S.C. § 396 (1991).

"it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services" ³

The first step toward a universally available noncommercial television service was taken in 1952 when the FCC, pursuant to its statutory mandate to distribute the available broadcast television channels in a "fair . . . and equitable" manner, 47 U.S.C. § 307(b), reserved nearly one-third of the nation's broadcast television channels for noncommercial educational users. Television Table of Allotments, 47 C.F.R. § 73.606 (1994). See FCC, Sixth Report and Order, Television Assignments, 41 FCC 148, 158-67 (1951). This reservation was intended to promote a television service "of an entirely different character from that available on most commercial stations." FCC, Third Notice of Further Proposed Rulemaking on Television Assignments, 16 Fed. Reg. 3072, 3079 (Mar. 22, 1951).

The FCC's initial reservation of 240 channels in 1952 has grown into a noncommercial broadcast infrastructure of 351 stations operated by 179 public television licensees, spread across the country's approximately 211 television markets. Brugger Decl. ¶ 4.⁴ The substantial funding necessary to

³ Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

⁴ Most declarations cited in this brief are located in the appendices to the public broadcasters' memorandum of points and authorities. The declarations of several witnesses cited

construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government at that time had expended nearly \$3 billion on public broadcasting since 1969. § 2(a)(8). State and local governments have contributed nearly \$5 billion since 1972.⁵ Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over \$6 billion during the same period.⁶

The bedrock of the public television system is local stations serving their local communities. While most public television stations show some nationally distributed programming,

below (Meek, Noll, and Rohlfis) are reproduced in other appendices filed by defendants.

⁵ H.R. Rep. No. 628, 102nd Cong., 2d Sess. 69 (1992) ("1992 House Report"), CR VOL. I.A, EXH. 4, CR 00448. Copies of most congressional materials cited below (including FCC materials) are located in Defendants' Joint Submission of Congressional Record in Support of Motion for Summary Judgment. The citations in the form CR VOL. ___, EXH. ___, CR ___ refer to the volume number of that Joint Submission, the exhibit number within the volume, and the Bates number of the page in question.

For the Court's convenience, excerpts from the congressional record (including certain FCC materials relating to public television) have been organized by subject matter and reproduced in the Public Broadcasters' Supplemental Statement of Evidence Before Congress. Other material excerpted from the congressional record is found in Defendants' Joint Statement of Evidence Before Congress ("JSCR").

⁶ Id. See also 1992 Cable Act, § 2(a)(8).

the stations as a group also provide, on an annual basis, almost 64,000 hours of locally oriented news and public affairs programs, locally oriented instructional programming, outlets to local cultural groups and coverage of local and state governments. Brugger Decl. ¶ 7. The local and noncommercial orientation of public television is particularly evident in its commitment to educational programming. For example, as of 1993, public television stations have prepared 1.6 million adults, many of them disabled or of modest means and with no other effective option, to earn a General Educational Development ("GED") certificate, the equivalent of a high-school diploma, through telecourses. Brugger Decl. ¶ 8.

B. Section 5 of the 1992 Cable Act

Cable has played an important role in advancing the goal of universal access to public television. Nearly two-thirds of public television stations are located in the hard-to-receive UHF frequency band (broadcast channels 14 and up). See Brugger Decl. ¶ 10; Downey Decl. ¶ 17. UHF signals are more easily obstructed by terrain, man-made obstacles and atmospheric conditions than are VHF signals (broadcast channels 2-13). Many households can receive UHF signals only by means of outdoor antennas, which viewers often find too difficult or expensive to install or maintain and which are, in any event, restricted in many communities across the country. See Brugger Decl. ¶ 10; Downey Decl. ¶¶ 17-19; Malloy Decl. ¶ 12. Thus, cable is a

particularly important conduit for the many public television stations that broadcast on UHF frequencies.

Cable's role as a conduit gives it a unique status as the "gatekeeper" into cable homes. As Congress found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over the air." 1992 House Report at 54, CR VOL. I.A, EXH. 4, CR 433.

Congress sought to protect public television stations from adverse cable carriage actions by enacting Section 5 of the 1992 Cable Act. This section requires cable operators to carry the signals of all "qualified local noncommercial educational television stations" whose signals the cable system carried as of March 29, 1990. 1992 Cable Act § 5(c).⁷ Section 5 also requires cable operators to carry the signals of a certain number of qualified local noncommercial educational television stations that request carriage. Id. § 5(b)(1). The number of stations

⁷ A "qualified noncommercial educational television station" is (1) a station licensed by the FCC as a noncommercial educational television broadcast station, owned by a public agency or nonprofit entity, and eligible to receive a community service grant from the CPB; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. Id. § 5(1)(1). A station is deemed "local" if the principal headend of the cable system is within 50 miles of the reference point of the station's principal community of license or within the station's Grade B contour. Id. § 5(1)(2).

that must be carried depends on the channel capacity of the cable system. Id. § 5(b)(1)-(3).

Section 5 also creates certain channel positioning rights. Each qualified local noncommercial educational television station having a right to carriage under Section 5 must be carried, at its election, on its current over-the-air channel or its channel position as of July 19, 1985, or on another channel number that is mutually agreed upon by the station and the cable operator. Id. § 5(g)(5).

C. The Supreme Court's Decision

At the initial stage of this case, this Court held that the must-carry provisions of the 1992 Cable Act are consistent with the First Amendment and granted summary judgment for defendants. On direct appeal, the Supreme Court vacated and remanded for further proceedings.

The Supreme Court held that the must-carry provisions of the 1992 Cable Act are content-neutral and that the appropriate standard by which to evaluate their constitutionality is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. Turner, 114 S. Ct. at 2469 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. O'Brien, 391 U.S. 367 (1968)). Under O'Brien and Ward, a content-neutral regulation of speech must be sustained if it furthers an important or substantial governmental interest unrelated to the suppression of free

expression, and if the restriction on speech is narrowly tailored to further that interest. O'Brien, 391 U.S. at 377; Ward, 491 U.S. at 799; see also Turner, 114 S. Ct. at 2469.

Applying this standard, the Court identified three governmental interests underlying Congress's enactment of must-carry provisions: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." Turner, 114 S. Ct. at 2469 (citing, inter alia, 1992 Cable Act, §§ 2(a)(8), (9), and (10)). The Court concluded that none of these interests is related to the "suppression of free expression" (citing O'Brien, 391 U.S. at 377), and that all were "important" and "substantial" for purposes of First Amendment analysis. Turner, 114 S. Ct. at 2469.

The Court remanded, however, for a determination of whether, in the plurality's words, Congress had drawn "reasonable inferences" based on "substantial evidence" that the must-carry rules are necessary to alleviate "past harms" or "anticipated harms" and would "in fact advance [the important governmental] interests" supporting the legislation. Turner, 114 S. Ct. at 2471, 2470 (opinion of Kennedy, J.). The plurality invited an "elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence." Id. at 2472.

The plurality also sought a clearer determination of whether the must-carry regulations "'burden substantially more speech than is necessary to further the government's legitimate interests.'" Id. at 2470 (quoting Ward, 491 U.S. at 799). Specifically, this Court was instructed to make findings concerning the "actual effects of must-carry on the speech of cable operators and cable programmers" and "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." Id. at 2472 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).

In remanding for further findings, the plurality expressly recognized that "Congress' predictive judgments are entitled to substantial deference" from the courts. Turner, 114 S. Ct. at 2471 (opinion of Kennedy, J.). The plurality noted that the remand "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the Court's] own." Id. Nor did the plurality anticipate that the factual record would be complete in all respects: "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." Id. (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. at 775, 814 (1978)).

SUMMARY OF ARGUMENT

I. The factual record before Congress when it enacted the 1992 Cable Act is a particularly comprehensive one. This record -- comprising years' worth of legislative hearings and a wealth of data collected by both Congress and the FCC -- fully supports the congressional determination that mandatory cable carriage of public television stations is necessary to advance the important governmental interests identified in the statute and the legislative history. The evidence before Congress also supports the conclusion that Section 5 is narrowly tailored to achieve these interests.

A. There was substantial evidence before Congress that universal access to public television's noncommercial, local programming -- including access on cable systems -- is a critical element in "promoting the widespread dissemination of information from a multiplicity of sources" (Turner, 114 S. Ct. at 2469). The evidence also showed that must-carry requirements are needed in order to ensure carriage of public television stations on cable. This evidence was both historical -- showing that cable operators had dropped or repositioned public television stations in significant numbers -- and anticipatory -- predicting that this behavior would intensify as the cable industry matured.

The evidence further showed that adverse actions by cable operators had a negative impact on the financial health of public television stations and that must-carry requirements would

help preserve the stations' ability to attract and maintain financial support. More importantly, the evidence showed that must-carry requirements for public television stations would further the government's interest in assuring universal access to public television's noncommercial programming. This, in turn, would promote the "widespread dissemination of information from a multiplicity of sources" (Turner, 114 S. Ct. at 2469).

B. There is also substantial evidence in the congressional record to support the conclusion that Section 5 is narrowly tailored to achieve the government's interests. No other alternative would serve the government's interests as effectively as the provisions of Section 5. The evidence showed that, once a household subscribed to cable, it would realistically have access only to those programs carried on cable. This is particularly true for the two-thirds of public television stations that broadcast on the UHF portion of the spectrum.

The requirements of Section 5 were carefully crafted to achieve its objectives with minimal burden on cable operators. Indeed, an earlier and largely identical version of the provision was agreed to and expressly supported by plaintiff National Cable Television Association.

II. Although the public broadcasters believe that the contents of the congressional record are more than sufficient to warrant summary judgment in their favor, there is also a wealth

of evidence outside of that record to support Congress's predictive judgment that must-carry requirements for public television would advance the important governmental interests of maintaining the financial viability of public television stations, fostering dissemination of information from multiple sources, and promoting fair competition in the market for television programming, and that the legislation is narrowly tailored to achieve those interests. Indeed, the additional evidence developed on remand indicates that the level of adverse carriage actions against public television stations in the 1985-1992 period was far greater than Congress was aware. This "additional evidence" (Turner, 114 S. Ct. at 2472), while not necessary to sustain the constitutionality of Section 5, further attests to its reasonableness.

ARGUMENT

I. THE RECORD BEFORE CONGRESS IS SUFFICIENT TO ESTABLISH THE CONSTITUTIONALITY OF THE MUST-CARRY REQUIREMENTS FOR PUBLIC TELEVISION.

Congress was well aware of the need to assure that the must-carry provisions enacted in 1992 were in fact a narrowly-tailored means essential to securing an important governmental interest. The FCC's own must-carry rules had already been struck down twice, on the ground that the agency had failed to make a record demonstrating the existence of an important governmental

interest and that the regulations were necessary to advance such an interest.⁸

As a result, the 1992 Cable Act is accompanied by "unusually detailed statutory findings." Turner, 114 S. Ct. at 2461. Those findings are drawn from an equally detailed record that fully supports Congress' determination that the must-carry provisions serve important government interests and are narrowly tailored to do so. With respect to public television, the record consisted of "[congressional] hearings, Congress' extensive study of noncommercial and cable television over the years, a wealth of data collected by the FCC on the need for cable carriage and the FCC Cable Report which strongly recommended that Congress adopt the noncommercial 'must carry' requirement."⁹

The evidence before Congress shows that, in addition to promoting fair competition, must-carry furthers the government's interest in preserving the financial health of public television stations. More importantly, the evidence shows that must carry promotes Congress' substantial interest in safeguarding universal access to the diverse sources of information provided by public

⁸ See Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

⁹ 1992 House Report at 69, CR VOL. I.A, EXH. 4, CR 00448.

television stations.¹⁰ Finally, the evidence demonstrates that Section 5 is narrowly tailored to serve those interests.

A. There Was Substantial Evidence Before Congress That Must-Carry Requirements for Public Television Stations Would Serve Important Governmental Interests.

1. The Government Has a Substantial Interest in Ensuring That Public Television Services Are Available on Cable Systems.

Prior to passage of the 1992 Cable Act, Congress considered evidence that cable carriage of public television stations serves substantial governmental interests. In its findings, Congress expressly referred to the importance of public television services to the government's goal of educating its citizens and the investment in public television already made by the public, through tax dollars and voluntary citizen contributions:

The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because --

(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

¹⁰ In defending the need for must-carry in the Supreme Court, the federal defendants relied "in principal part" on Congress' finding that the economic health of broadcasters would be "seriously jeopardized" without must-carry. Turner, 114 S. Ct. at 2470. Nothing in the plurality's opinion, however, precludes defendants from demonstrating additional ways in which the record supports Congress's conclusion that must-carry requirements for public television stations would advance important governmental interests.

(B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of \$10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

(C) the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than \$3,000,000,000 in public broadcasting since 1969; and

(D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

1992 Cable Act § 2(a)(8). The Supreme Court cited this finding in concluding that in enacting must-carry requirements Congress had identified important governmental interests unrelated to the suppression of free expression, including promotion of the dissemination of information from a multiplicity of sources. 114 S. Ct. at 2469.

In enacting must-carry requirements, Congress was well aware of public television's role as a source of noncommercial programming that served as an alternative to that available on for-profit, commercial channels. In testimony before the Senate Subcommittee on Communications in 1989, David Brugger, President of APTS,¹¹ explained how public television had come to play a unique role in the telecommunications infrastructure:

¹¹ APTS was previously known as the National Association of Public Television Stations ("NAPTS"). For convenience, we refer to the organization as APTS throughout this brief.

Today, public broadcasting is the only locally-controlled service among the communications media of the United States whose sole purpose is to produce and distribute programs designed to serve the public and educational interests, rather than commercial interests. . . ." Distinct from commercial and cable television, however, public television's objective is to satisfy viewers needs, impart knowledge and understanding, and open doors to the vast range of our cultural diversity -- not to deliver advertisements to audiences.¹²

Mr. Brugger further recalled Congress' declaration in the Public Broadcasting Act of 1967 that "it furthers the general welfare" to encourage public broadcasting "which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications service for all citizens of the nation. . . ." ¹³

¹² Must Carry: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 101st Cong., 1st Sess. 96 (1989) ("1989 Senate Hearings") (testimony of David Brugger) (quoting 47 U.S.C. § 396(a)(4)), CR VOL. I.A, EXH. 12, CR 04106.

¹³ Id. at 95, CR VOL. I.A., EXH. 12, CR 04105. Several state and local government agencies also emphasized that public television stations provide programming that fills unique needs not served by other programming sources. See, e.g., Joint Comments of Metropolitan Board of Education, Long Island Educational Television Council, Metropolitan Pittsburgh Public Broadcasting Inc., and Santa Clara Board of Education in FCC MM Docket 85-349 (Apr. 25, 1986), at 10, CR VOL. I.CC, EXH. 172, CR 16502; Comments of State Public Broadcasting Networks in FCC MM Docket 85-349 (Jan. 29, 1986), CR VOL. I.CC, EXH. 166, CR 16225.

Other evidence before Congress confirmed that public television stations provide a range of public services that distinguish them from commercial programming sources. Among other things, public television stations serve as providers of:

- instructional programming to 70,000 school districts;¹⁴
- a wide range of adult education services, including credit courses in conjunction with local colleges, as well as programs designed to combat adult illiteracy;¹⁵
- foreign language programming and programming targeted to racial minorities;¹⁶
- unique services for special needs audiences, such as captioning for the deaf and hearing-impaired and descriptive video for the blind and visually-impaired.¹⁷

In explaining the need for must-carry requirements for public television, the House Committee report stressed the longstanding government interest in universal access to public

¹⁴ Cable Television Regulation: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102nd Cong., 1st Sess. 831 (1991) ("1991 House Hearings"), CR VOL. I.J, EXH. 18, CR 07835 (testimony of Henry P. Becton, Jr.); see also Comments of CPB, APTS, and PBS in FCC MM Docket No. 85-349 (Jan. 29, 1986), at 3, CR VOL. I.BB, EXH. 163, CR 15986.

¹⁵ See 1989 Senate Hearings at 112 (testimony of David Brugger) (over one million adults take college courses at home), CR VOL. I.F, EXH. 12, CR 04122.

¹⁶ See 1991 House Hearings at 835-40, CR VOL. I.J, EXH. 18, CR 7839-44; Comments of CPB, APTS, and PBS in MM 85-349, at 4-5, CR VOL. I.BB, EXH. 163, CR 15987-88.

¹⁷ See 1991 House Hearings at 831, CR VOL. I.J, EXH. 18, CR 07835 (testimony of Henry P. Becton, Jr.).

television services. The report explained that in the Public Broadcasting Act of 1967, Congress specifically found that

"it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make [public broadcasting services] available to all the citizens of the United States." Congress has authorized almost \$400 million since 1962 to build and improve public television facilities to "extend delivery of public telecommunications services to as many citizens of the United States as possible" and as recently as 1988 authorized \$200 million through FY 1993 to replace and upgrade the satellite systems carrying public telecommunications services to stations across the country. Unimpeded access to public television programming is such an important telecommunications objective that Congress requires that the Public Broadcasting Service (PBS) maintain one clear, unencrypted satellite feed for use by satellite dish owners in unserved areas.¹⁸

The House Committee further noted that universal access was important because local communities and private citizens had made substantial investments in public television:

Over two-thirds of public television stations are licensed to state and local government agencies, public colleges and universities, school districts and other public groups which have provided public service programming at a state and local taxpayer investment of \$4.9 billion since 1972. Moreover, private contributions of \$6.1 billion since 1972 constitute the largest source of support for public television and are one indicator of the success of public

¹⁸ 1992 House Report at 68, CR VOL. I.A, EXH. 4, CR 00447 (emphasis added).

television in serving the needs and interests of local communities.¹⁹

Congress properly concluded that cable carriage of public television stations serves the goal of universal access to public television's services. In 1988, APTS estimated that four percent of public television's coverage nationwide was dependent on cable's extension of stations' over-the-air reach; in addition, "an inestimable number of homes' reception of public television has improved due to cable carriage."²⁰ David Brugger, President of APTS, testified that "[w]ith a cable penetration rate of over 50 percent of TV households, a key factor in public TV's continued ability to meet Congress's mandate [of universal access to public television programming] is cable carriage."²¹

In sum, the evidence before Congress showed that assurance of cable carriage would safeguard the government's longstanding interest in providing universal access to public television services and in preserving the very substantial investment made by the public through tax dollars and viewer contributions. The evidence fully supported Congress' conclusion

¹⁹ Id. at 69, CR VOL I.A, EXH. 4, CR 00448. -

²⁰ Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. 524 (1988) ("1988 House Hearings"), CR VOL. I.D, EXH. 6, CR 02613.

²¹ Id. at 522, CR VOL. I.D, EXH. 6, CR 02611.

that cable carriage of public television stations helps, among other things, to promote the availability of information "from a multiplicity of sources." Turner, 114 S. Ct. at 2469.

2. There Was Substantial Evidence Before Congress that Public Television Stations Are Especially Vulnerable to Non-Carriage by Cable Systems.

Congress had before it predictive evidence that the noncommercial mission of public television stations made them particularly vulnerable to adverse cable carriage actions. Substantial historical evidence confirmed these predictions. On the basis of this evidence, it was reasonable for Congress to infer that there was an unacceptable risk that many public television stations would not be carried by their local cable systems without must-carry rules.

- a. The evidence showed that without must-carry or the threat of must-carry, cable systems would likely drop public television stations and replace them with cable-only programs.

The evidence before Congress demonstrated that public television stations were likely to be dropped or denied carriage on cable because the commercial marketplace would not be likely to attribute significant value to the noncommercial mission of public television. The evidence further showed that a public television station was likely to be replaced by a "cable-only" program. This evidence confirmed that, absent must carry, noncommercial stations are at a distinct disadvantage in the commercial marketplace.

In testimony before the Senate Subcommittee on Communications, David Brugger explained why public television services are unlikely to meet a cable operator's financial criteria for carriage. Mr. Brugger cited an econometric model produced by United Cable Corporation and the consulting firm of Brown, Bortz, and Coddington for evaluating cable systems and their optimal channel use.²² He noted that the model "systematically estimates a programming service's revenue contribution to the cable system. Public television services are unlikely to rate high on implicit or explicit criteria in this sort of decisionmaking." ²³

George Miles, a station manager and board member of APTS, testified that "public TV is at a natural disadvantage compared with most other program services. Our stations are owned by universities, school systems and nonprofit community groups. We cannot offer an equity position to major cable operators, nor can we offer advertising time to cable systems as

²² 1989 Senate Hearings at 100, CR VOL. I.F, EXH. 12, CR 04110.

²³ Id.; see also id. at 107, CR VOL. I.F, EXH. 12, CR 04117; Comments of APTS in FCC MM Docket No. 89-600 (March 1, 1990) at 5, 18, CR VOL. I.T, EXH. 103, CR 12187; Comments of APTS and PBS in FCC MM Docket No. 88-138 (July 8, 1988), at 4, 5, CR VOL. I.Z, EXH. 140, CR 15288-89.

do many program services."²⁴ Then-Senator Gore summarized the predictive evidence in a similar manner:

[C]able systems are for-profit enterprises and naturally seek to carry programming which maximizes dollars and audience. Public television, in fulfilling its mandate to serve those audiences not served by commercial enterprises, carries much programming that cable systems find economically unattractive.²⁵

Echoing this evidence, the House Committee on Energy and Commerce concluded that, absent statutory carriage requirements, it is likely that local public television stations will be denied carriage on cable systems:

Because cable operators are for-profit enterprises, they necessarily seek to provide customers with the package of programming and services that will maximize the operators' profits. As commercial enterprises, cable operators ordinarily lack strong incentive to carry programming that does not attract sufficient dollars or audiences. Traditionally, public television has provided precisely the type of programming commercial broadcasters

²⁴ Cable Television Regulation: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess., pt. 2, at 89 (1990) ("1990 House Hearings"), CR VOL. I.I, EXH. 16, CR 06256; see also Comments of APTS and PBS in MM 88-138, at 9, CR VOL. I.Z, EXH. 140, CR 15293 ("Public television stations cannot provide local ad spots for use by cable operators, cannot afford to pay for carriage, and are not, by virtue of their congressional mandate, designed to please mass audiences as a primary goal."); Comments of State Public Broadcasting Networks in MM 85-349, at i, 17, CR VOL. I.CC, EXH. 166, CR 16227, 16245; Joint Comments of Metropolitan Board of Education et al. in MM 85-349, at 3, CR VOL. I.CC, EXH. 172, CR 16495.

²⁵ 138 Cong. Rec. S594 (Jan. 29, 1992), CR VOL. I.EE, EXH. 198, CR 17135.

and cable operators find economically unattractive. For this reason, the Committee believes that, without 'must carry' provisions, public television service increasingly will become unavailable to cable subscribers.²⁶

- b. The historical evidence showed that public television stations had been dropped or repositioned in significant numbers.

The "economic logic"²⁷ underlying the predictive evidence before Congress was confirmed by empirical data. Several studies showed that millions of viewers had lost access to public television stations because of the actions of cable

²⁶ 1992 House Report at 70, CR VOL. I.A, EXH. 4, CR 00449.

²⁷ See id.

operators. Principal among these was the survey the FCC undertook in 1988, in response to a congressional request.²⁸ The FCC found that 80 of the 237 public television stations reporting had been dropped by or denied carriage on at least one cable system, with total incidents of drops numbering 345. Of the 4,303 cable companies responding, 347 operators reported that they had dropped or denied carriage to a total of 153 public television stations, with total incidents of drops numbering 177.²⁹ The FCC also reported that 88 of the 237 responding public television stations had been repositioned, with 417 total incidents, and that 432 of the 4,303 cable companies responding reported repositioning 182 public television stations, with a total of 541 incidents.³⁰

The Supreme Court's plurality opinion notes that the FCC's report does not indicate "the time frame within which these drops occurred, or how many of these stations were dropped for only a temporary period and then restored to carriage." Turner,

²⁸ Federal Communications Commission, Cable System Broadcast Signal Carriage Survey Report, in FCC MM Docket No. 90-4 (Sept. 1, 1988), CR VOL. I.P, EXH. 52, CR 10645. The survey was sent to 8,504 cable systems and 1,356 television stations and elicited returns from 50.6% of the cable systems and 67.3% of the television stations, respectively. Respondents were asked to identify drops, noncarriage, and channel shifts that would have been covered by the FCC's rules in effect prior to July 19, 1985. See id. at 4 & n.2, CR VOL. I.P, EXH. 52, CR 10648.

²⁹ Id. at 9, 10, CR VOL. I.P, EXH. 52, CR 10653, 10654.

³⁰ Id. at 18, 19, CR VOL. I.P, EXH. 52, CR 10662, 10663.

114 S. Ct. at 2471. There have been other criticisms of the survey as well. Of course, like most such efforts, the 1988 FCC survey can be criticized in hindsight. However, it was the most comprehensive effort to evaluate cable carriage experience available to Congress at the time. In light of the Turner plurality's admonitions (1) that "complete empirical support may be unavailable" for the "deductions and inferences" legislators must make in order "to forecast future events and to anticipate the likely impact of these events" (Turner, 114 S. Ct. at 2471), and (2) that this Court is not "to reweigh the evidence de novo" (id.), the FCC study results should certainly be regarded as substantial support for Congress' conclusion that there was a need for must-carry requirements to protect public television stations.

In any event, even the most vocal critics of the FCC survey could not deny that there had been substantial numbers of drops and shifts. The NCTA's own survey showed that 205 cable systems (representing almost 2.5 million subscribers) were not carrying all qualified broadcast stations, and that 305 cable systems had repositioned at least one qualified station since June 1987. In each case, about 20 percent of the stations affected were public television stations.³¹

³¹ National Cable Television Association, Broadcast Station Carriage Survey, in MM Docket 88-138 (Sept. 14, 1988), at 1338-39, 1351, CR VOL. I.AA, EXH. 146, CR 15424-25, CR 15437.

Moreover, Congress and the FCC had additional evidence indicating that there had been an increasing number of incidents of drops, noncarriage, and repositioning in the period prior to the FCC survey. That evidence included the following reports:

- In October 1985, the public broadcasters informed the FCC that in just three months since the Quincy decision had been handed down several public television stations had already been dropped, and others had been asked to pay for carriage, "sums they can ill afford."³²
- In the summer of 1987, APTS verified a total of 74 stations dropped since the Quincy decision, and 128 instances where stations had been repositioned, as well as eight instances of channel-shift threats from cable companies to local public television stations. For 36 of 44 verified drops between 1985 and 1987 for which information on replacement programming was available, the replacement service was a programming service exclusive to cable. In addition, three of 17 stations that had come on the air since July 1985 had encountered problems obtaining cable carriage.³³
- In the spring of 1988, APTS reported to Congress 94 instances in which public television stations had been dropped from cable systems and the service was not restored and 197 instances of channel shifting for public television stations.³⁴

³² CPB, APTS and PBS Joint Petition for Rulemaking, at 11 (Oct. 15, 1985) (reproduced in Volume 5 of the Appendix to this memorandum); see also Comments of CPB, APTS, and PBS in MM 85-349, at 27, CR VOL. I.BB, EXH. 163, CR 16010; letter from Ohio University Telecommunications Center in FCC MM Docket No. 85-349 (June 23, 1986), at 1, CR VOL. I.CC, EXH. 175, CR 16563 (public television station dropped in favor of electronic billboard where cable operator could sell advertising).

³³ APTS and PBS Comments in MM 88-138, at 15, CR VOL. I.Z, EXH. 140, CR 15299.

³⁴ 1988 House Hearings at 597, CR VOL. I.D, EXH. 6, CR 02684 (testimony of David Brugger).

Congressional hearings on must-carry began in earnest in the fall of 1989, and this appears to have had the effect of slowing the number of adverse cable actions. However, it did not stem them completely. In the fall of 1991, APTS advised the FCC that in a survey of its member stations, at least 16 of the stations responding reported that they had been dropped since 1989 by cable systems with headends within 50 miles of the stations' main transmitters or within the stations' Grade B contours. The majority of these had been replaced with cable-exclusive program services.³⁵

The evidence also indicated that most drops were not temporary. In the summer of 1987, APTS investigated all reports of dropped or repositioned stations that it had received from its members.³⁶ Of the 74 verified cable system drops of a public television signal, only 16 (22%) were later restored. Of the 128 verified shifts of a public television signal from its original cable channel location, only 30 (23%) were later restored to their former channel number.³⁷

³⁵ Supplemental Comments of APTS in FCC MM Docket No. 90-4 (Sept. 25, 1991), at 14, CR VOL. I.P, EXH. 64, CR 10801.

³⁶ The reported incidents were verified by calls to the cable system and were reviewed to exclude those stations that were "distant" signals and therefore did not qualify for carriage under the pre-Quincy must-carry regulations. See APTS and PBS Comments in MM 88-138, at 12, CR VOL. I.Z, EXH. 140, CR 15296.

³⁷ Id. at 22, CR VOL. I.Z, EXH. 140, CR 15306.

There was also ample evidence before Congress to suggest that the historical data, although sobering, understated the magnitude of future harm. The evidence showed that the drop/shift statistics presented to Congress and the FCC tended to understate the extent of the problem for several reasons. First, stations were not always aware of when they had been dropped or repositioned. APTS and PBS advised the FCC that "[m]any stations are unaware of which cable systems are carrying them, on which channels, and whether such systems are within their grade B contour. Cable lineups also can change often, making up-to-date information even harder to obtain. In addition, there is no requirement that cable systems notify dropped stations that they have been dropped."³⁸

Congress was also aware of evidence that made it clear that the cable operators were exercising considerable self-restraint during this period.³⁹ For example, Edward Allen, Chairman of the NCTA, on several occasions advised cable operators to refrain temporarily from dropping or shifting stations. Mr. Allen told cable operators to "'hold their fire and wait for this to calm down' because action would be

³⁸ Comments of APTS and PBS in MM 88-138, at 12-13, CR VOL. I.Z, EXH. 140, CR 15296-97.

³⁹ See generally JSCR ¶¶ 524-530. "JSCR" refers to Defendants' Joint Statement of Evidence Before Congress.

'politically dangerous.' "⁴⁰ In urging cable operators not to act precipitously in the wake of the Quincy decision, "Allen . . . cautioned the Washington Cable Club that '[a] wise man doesn't insult the alligators until he's across the river.' "⁴¹

There was also evidence that the incidence of drops and shifts was likely to increase once any threat of must-carry regulation had passed. David Brugger cautioned a Senate subcommittee that "as the must carry rules recede further into the past, cable operators will continue to drop, shift or exclude public television services at an accelerating rate."⁴²

* * * * *

In sum, in view of the predictive evidence that the commercial goals of cable operators gave them incentives to drop or reposition noncommercial services, the historical evidence

⁴⁰ Comments of NAB in MM 85-349 at 27, JSCR ¶ 526.

⁴¹ Comments of Spanish International Communications Corporation, et al. in MM 85-349 at 10-11, JSCR ¶ 526; see also Comments of Association of Independent Television Stations, Inc. in MM 85-349 at vi, CR VOL. I.BB, EXH. 162, CR 15829 ("Cable industry leaders have publicly admonished cable operators to refrain temporarily from exercising the new leverage given them by the Quincy decision. Consequently, only the 'tip of the iceberg' of harm to broadcasters has surfaced to date.")

⁴² 1989 Senate Hearings at 102, CR VOL. I.F, EXH. 12, CR 04112; see also 1991 House Hearings at 835, CR VOL. I.J, EXH. 18, CR 07839 (testimony of Henry P. Becton, Jr., President and General Manager of WGBH (Boston)) (situation likely to deteriorate as the cable market became more competitive); id. at 843, CR VOL. I.J, EXH. 18, CR 07847; Comments of APTS and PBS in MM 88-138, at 3, CR VOL. I.Z, EXH. 140, CR 15287.

that cable companies had taken adverse actions against a number of public television stations, and the common-sense evidence that the "drop/shift" statistics did not capture the full extent of either the actual or potential harm, Congress could reasonably infer that, absent must-carry, public television stations would be dropped, denied carriage, and repositioned in significant numbers.

3. There Was Substantial Evidence Before Congress That Must-Carry Requirements for Public Television Stations Would Promote the Financial Health of Those Stations and Ensure the Widespread Dissemination of Information from Noncommercial Sources.
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There was substantial evidence before Congress that must carry was needed to alleviate past harms and to prevent anticipated harms to public television stations.

- a. The evidence showed that public television stations would suffer financial harm in the absence of must carry.

The Turner plurality stated that "even if one accepts that a large number of broadcast stations would be dropped or repositioned in the absence of must-carry, the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result." 114 S. Ct. at 2471-72. There is no question that Congress could reasonably

conclude that public television stations that were dropped or repositioned would experience financial difficulties. While public television stations have noncommercial objectives and a different financial structure from commercial broadcasters, financial health is obviously crucial to their ability to fulfill their mission. If a public television station loses significant financial support as a result of being dropped or repositioned, its ability to continue providing universal access to a high quality source of noncommercial programming will be impeded.

For public television stations, one of the primary financial effects of adverse carriage actions centers on their ability to attract viewer contributions. As of 1991, public television stations received approximately 21 percent of their revenue from viewer contributions, making this the largest single source of funds for public television programming.⁴³ Then-Senator Gore aptly summarized the evidence regarding the potentially disastrous financial consequences of noncarriage on public television stations:

The impact of noncarriage is particularly devastating to public television stations. The largest single source of funding for public television is from private individual contributions. When a local cable system drops a public television station, its contributions from its cable viewers are in jeopardy. Without the key financial support from its cable audience, a public television station can easily slip below

⁴³ Supplemental Comments of APTS in MM 90-4 (Sept. 25, 1991), at 17, CR VOL. I.P, EXH. 64, CR 10804.

the level of viability required to continue to provide service to its broadcast audience. Stations not only lose audience and contributors, they also lose paying enrollees to their college telecourses, and elementary and high school students are deprived of their instructional programming.⁴⁴

It is common sense that when a local public television station disappears from a cable system, it loses its ability to reach out to those cable subscribers and to attract contributions from them.⁴⁵ FCC Commissioner James Quello testified about this financial effect of cable drops:

The most significant problem confronting public television today is adequate funding. As the former Chairman of the Temporary Commission on Alternative Financing for Public Telecommunications, I can attest to the difficulties public stations have in securing non-government funds. The dropping of a public television station can have enormous impact on a station's revenues. . . . Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating. Moreover, some advertiser supported cable networks compete with public television for programming. Increased cable revenues combined with decreases in funding

⁴⁴ 138 Cong. Rec. S594 (Jan. 29, 1992), CR VOL. I.EE, EXH. 198, CR 17136.

⁴⁵ See Public Cable Co., 64 F.C.C.2d 701, 709 (1977) (citing premise that "revenue sources of a local educational television broadcast station can be considered sensitive to audience size;" noting that loss of audience can also affect other forms of station revenue, including matching grants, business contributions, and state budget allocations), aff'd, Colby-Bates-Bowdoin Educational Telecasting Corp. v. FCC, 574 F.2d 639 (1st Cir. 1978).

place public television in a form of double jeopardy.⁴⁶

The congressional record contains reports of public television experiences demonstrating that the loss of viewers inherent in either a drop or a shift of cable channel position would eventually lead to a loss of membership and contributions:

- WNIN, Evansville, Indiana, reported a membership loss after being dropped by the cable system in Loogootee, Indiana. Supplemental Comments of APTS in MM 90-4, at 18, CR VOL. I.P, EXH. 64, CR 10805.
- WIPB, Muncie, Indiana reported a membership loss after being dropped by the cable system in Bluffton, Indiana. Id.
- When WKAR, East Lansing, Michigan, was dropped from the cable system in Battle Creek, Michigan, it reported a loss of 592 contributing members in the Battle Creek area. Id.
- KIIN, Iowa Public Television, was moved by a TCI cable system from its over-the-air channel 12 to channel 22 in four towns in Dubuque County, an area with hilly terrain. Following that action, IPTV noticed that membership increases in the area of the channel shift were down 75% as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable-ready sets. Many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their homes. 1989 Senate Hearings at 102, CR VOL. I.F, EXH. 12, CR 04113 (testimony of David Brugger).
- Nebraska ETV Network's KTNE was moved from Channel 8 to Channel 28 in Alliance, Nebraska, by the Alliance Community TV Company. The former channel number was subsequently restored, but in the meantime ETV Network received many complaints from subscribers. Subscribers complained that the higher number required an additional converter box, which costs extra for second

⁴⁶ 1988 House Hearings at 323-24, CR VOL. I.D, EXH. 9, CR 2409-10.

sets. Other viewers complained that the necessity of the converter box required people with remote control units that only work up to Channel 13 to get up from their seats to change the channel, and that this posed a special problem for older citizens. Viewers also complained that the reception was much poorer. One former member of KTNE returned his membership pledge form refusing to contribute until KTNE was moved to a channel with better reception. Comments of APTS and PBS in MM 88-138, at 25, CR VOL. I.Z, EXH. 140, CR 15309.

The evidence showed that loss of membership contributions could have an even greater financial impact for stations that failed to raise the level of funds necessary to earn matching funds from the federal government.⁴⁷ Moreover, in addition to the harm to individual stations, the congressional testimony made clear that lost revenue threatened the integrity of public television as a whole. As Donald Ledwig of CPB explained: "Th[e] loss of carriage of individual stations exerts a cumulative drag on the ability of the stations to finance production of new and innovative programming, because public television funds many of its programs collectively through such mechanisms as the Station Program Cooperative and the Program Challenge Fund. Thus, carriage loss of each individual station harms the overall public television system."⁴⁸

⁴⁷ 1988 House Hearings at 521, CR VOL. I.D, EXH. 9, CR 02610 (testimony of David Brugger); see also Comments of CPB, APTS, and PBS in MM 85-349, at 30-31, CR VOL. I.BB, EXH. 163, CR 16013-14.

⁴⁸ 1988 House Hearings at 602, CR VOL. I.D, EXH. 149, CR 02689; see also Comments of CPB, APTS, and PBS in MM 85-349, at 32, CR VOL. I.BB, EXH. 163, CR 16015.

Even in those cases in which a station was restored to carriage or to its former channel location, the station was often required to make a substantial expenditure of resources to achieve restoration. The congressional record includes the following examples:

- WJCT in Jacksonville, Florida, was dropped by a cable system in Palm Coast, Florida. WJCT launched an aggressive member campaign, and station representatives met with the local operator and the system's parent company to urge that service be restored. The station was off the system for six weeks before reinstatement. Supplemental Comments of APTS in MM 90-4, at 16, CR VOL. I.P, EXH. 64, CR 10803.
- Georgia Public Television was dropped in Peachtree City, Georgia. Georgia Public Television devoted one staff member on a full-time basis to restoring carriage on the system, and several of the organization's executives joined in the campaign. After one month, the service was reinstated. Id.
- WILL-TV, licensed to the University of Illinois and the prime instructional television service for almost 4000 students in Jacksonville and South Jacksonville, Illinois, was dropped from a Jacksonville cable system and restored only after much effort and expense by the station. 1991 House Hearings at 842, CR VOL. I.J, EXH. 18, CR 07846.

Thus, Congress was aware that even those stations ultimately restored suffered injury, as did their viewers.

Moreover, the evidence before the FCC and Congress showed that the lack of must-carry rules caused financial injury to even those stations that were carried by their cable systems. As APTS discovered in a 1991 survey of its members, many public television stations annually devoted thousands of dollars and

hundreds of staff hours guarding against deletion of their signals through promotional efforts among local cable operators.⁴⁹ The great majority of responding stations monitored local cable systems to guard against "drops" undertaken without advance notice. Of the 93 stations that provided cost estimates for their "cable relations" efforts, spending averaged \$4,800 annually and ranged as high as \$30,000 per year. Approximately 20 stations reported expenditures of \$8,000 or more annually to remain in contact with their local cable systems, and the staff members dedicated to these efforts spent as much as 30 to 50 percent of their time on cable issues.⁵⁰ As APTS remarked, such efforts "drain away funds that stations otherwise could invest in programming and other services to local viewers."⁵¹

The evidence also showed that development of new public television stations might be thwarted if there was no guarantee that the station could reach cable households and thereby obtain membership contributions from those households. Several local government agencies provided the example of a new Pittsburgh station:

⁴⁹ Supplemental Comments of APTS in MM 90-4, at 6, CR VOL. I.P, EXH. 64, CR 10793.

⁵⁰ Id. at 20, CR VOL. I.P, EXH. 64, CR 10807.

⁵¹ Id. at 6, CR VOL. I.P, EXH. 64, CR 10795; see also id. at 18, CR VOL. I.P, EXH. 64, CR 10805.

The dilemma of new stations is aptly illustrated in Pittsburgh. Metropolitan Pittsburgh is presently involved in the restoration of Station WQEX(TV), Pittsburgh, Pennsylvania, which has been dark for over one year. . . . The station is being revived because there is a need in Pittsburgh for a new mix of instructional, informational and cultural programming. . . .

Metropolitan Pittsburgh's ability to achieve its goals for Station WQEX(TV) depends largely on the availability of adequate cable carriage. . . . Lack of viewers will translate directly into a lack of station members and membership dollars. Lack of funds could result in curtailment or termination of station operations, thereby depriving the public of a new and important source of programming.⁵²

Moreover, the evidence before Congress clearly demonstrated that repositioning a public television station to a (usually higher) channel number could be almost as harmful as dropping the station completely. See pages 34-35, supra. The Senate Committee concluded that "channel repositioning has a direct and negative impact on the competitive viability of local broadcast stations and thus the ability to serve the needs of local communities." S. Rep. No. 381, 101st Cong., 2d Sess. 35 (1991), CR VOL. I.A, EXH. 1, CR 62. It explained:

There is ample evidence in the record demonstrating that channel repositioning is accompanied by a significant audience loss. Moreover, repositioning can prevent significant portions of the community from receiving local off-air broadcast signals.

⁵² Joint Comments of Metropolitan Board of Education, et al., in MM 85-349, at 13-14, CR VOL. I.CC, EXH. 172, CR 16505-06.

The Committee notes that repositioning of local broadcast signals does not appear to be the result of subscriber preference or market-place demand. . . . Shifts are made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities.

Id. Inclusion of the statutory limitation on channel repositioning was clearly necessary to satisfy important governmental interests and does not detract from the conclusion that Section 5 is narrowly tailored.

In view of this evidence, Congress was clearly in a position to conclude that public television stations would suffer financial difficulties as a result of adverse cable actions and that these difficulties would impair their ability to serve as an important alternative information source.⁵³

- b. The evidence also showed that must-carry requirements for public television stations would help ensure the "widespread dissemination of information" from noncommercial sources.

In its decision, the Supreme Court referred to the question whether broadcast stations had fallen into bankruptcy, turned in their licenses, or otherwise "suffered a serious

⁵³ In view of the fact that cable systems were on "good behavior" during the period in which must-carry rules were not in effect (see pages 29-30, supra), as well as the fact that public television stations have a "safety net" of some state and/or federal funding, it is not surprising that there was no evidence before Congress that any public television stations had "fallen into bankruptcy [or] turned in their broadcast licenses." Turner, 114 S.Ct. at 2472. At the same time, however, the absence of long-term must carry protection clearly presented a threat to the financial health of public television stations.

reduction in operating revenues" as a result of adverse cable action. Turner, 114, S. Ct. at 2472. However, these are commercial criteria, which do not adequately take into account nonprofit public television stations. While revenue and financial viability clearly have relevance to the success and long-term health of a public television station, financial viability is not the only measure of harm to be applied. The threat to public television stations should be assessed primarily by how many households lost access to the noncommercial programming that their tax dollars and contributions helped to support.

Congress was well aware that public television stations must be measured by different criteria for harm than commercial entities. Henry Becton, President of WGBH, Boston, testified before the House subcommittee:

We are, quite simply, different. We are public, non-profit, a national resource available to every American. There are no monthly cable charges, no three minute breaks for commercials, no effort on our part to exchange quality for quantity because of the dictates of the market. If we behave differently than our colleagues in the telecommunications industry it is because we are different. We have different goals, a different agenda, and a different definition of what we deem success.⁵⁴

⁵⁴ 1991 House Hearings at 841, CR VOL. I.J, EXH. 18, CR 07845.

Congress expressly recognized that nonfinancial interests support must-carry requirements for public television stations. The House committee report explained that must-carry for public television stations would serve a substantial government interest by enabling the American public to continue to "have access to the programming that is available only on public television -- programming that for-profit, commercial stations either cannot or will not provide."⁵⁵

Because the Court recognized "widespread dissemination of information from a multiplicity of sources" to be an important governmental interest unrelated to suppression of free expression (Turner, 114 S. Ct. at 2469), Section 5 need not be supported by evidence of financial harm, exclusively. Even if the financial impact were minimal, the drop or relocation of public television stations would harm the public interest, because millions of households would lose access to the noncommercial programming available only through public television. Thus, although financial impact on public television stations is one element of the harm resulting from adverse cable actions, an equally concrete harm is that suffered by viewers who are deprived of the public television services they have funded through their tax dollars and private contributions.

⁵⁵ 1992 House Report at 73, CR VOL. I.A, EXH. 4, CR 00452.

The evidence before Congress showed that, absent must carry, millions of households would lose access to public television programming paid for with their tax dollars and private contributions. As a result, these households would have fewer alternatives to the commercial programming available from their cable company. APTS calculated that for the 74 drops it had verified in the summer of 1987, as many as 2.1 million households were unable to see a particular local public television station on their cable system.⁵⁶ Similarly, some 3 million cable households were affected by the 128 verified channel shifts of local public television stations.⁵⁷ Some of these households were not able to find the station after the shift or, if they owned a "non-cable-ready" television set, were not willing to obtain a converter for some or all sets in the household.⁵⁸ For all practical purposes, these households lost the ability to access the affected station.

APTS provided evidence that some of the stations that had suffered the most adverse actions were those that were least likely to appeal to a large audience, but whose programming was

⁵⁶ Comments of APTS and PBS in MM 88-138, at 15, CR VOL. I.Z, EXH. 140, CR 15299.

⁵⁷ Id. at 23, CR VOL. I.Z, EXH. 140, CR 15307.

⁵⁸ For example, WLRN, Miami, Florida, was repositioned from its over-the-air channel (Channel 17) to Channel 26. Many of the 69,000 subscribers to Miami Cablevision lost track of where WLRN had gone and assumed it had gone off the air. Id. at 20, CR VOL. I.Z, EXH. 140, CR 15304.

critical to underserved audiences. For example, APTS found in its 1987 telephone survey that more than half of the 74 verified drops and the 128 verified channel shifts involved stations licensed to local school boards, colleges, and universities.⁵⁹ Such stations tend to carry a substantial amount of instructional programming and are essential to students attempting to obtain school credit through telecourses.⁶⁰

The record contains many individual examples of situations in which cable households suffered a real loss of an alternative information source when a public television station was dropped:

- KCSM, San Mateo, California, a university licensee, estimated that when it was dropped by Viacom in San Francisco it lost more than half of its paying telecourse enrollments. In addition, vastly more people watched the credit courses without enrolling, and these people were deprived as well.⁶¹
- When WCET, Cincinnati, Ohio, was dropped by Viacom Cable in Dayton, Ohio, cable subscribers lost access to a number of instructional programs and local companion documentaries that supplemented the Project Literacy

⁵⁹ Id. at 14, 23, CR VOL. I.Z, EXH. 140, CR 15298, 15307.

⁶⁰ See id. at Attachment 4, CR VOL. I.Z, EXH. 140, CR 15317.

⁶¹ Id. at 17, CR VOL. I.Z, EXH. 140, CR 15301. A cable subscriber who lost access to KCSM wrote that "my family would be lost without it. I have taken many TV courses on it and continue to do so, also my sons that are now 27 years old. They work various shifts and some semesters it is the only way they can get in a college course. It is also so very good for poor folks that find this is the only way they can further any kind of education at this time[.]" Id. at Attachment 4, CR VOL. I.Z, EXH. 140, CR 15317.

Outreach program, as well as classic movies on Saturday night.⁶²

- When WGBX, Boston, Massachusetts, was dropped by Heritage Cablevision in Massachusetts and Rhode Island, some 58,000 cable subscribers lost programs not run by another station in the area.⁶³
- WLRN, Miami, Florida, licensed to a local school board, was dropped and shifted by various cable systems in Miami. As a result, cable subscribers lost access to a regular schedule of programming in both Spanish and Creole and coverage of high school sports.⁶⁴
- When WKAR, East Lansing, Michigan, was dropped from a cable system in Battle Creek, Michigan, viewers lost the only available coverage of the Michigan legislature.⁶⁵
- When Louisiana Public Broadcasting was dropped in Luling, Louisiana, 4,000 viewers lost access to college credit, GED, and other literacy programs.⁶⁶
- When Casper Cable refused to carry Wyoming Public Television, cable subscribers lost access to telecourses offered through local colleges and instructional programs for elementary and secondary schools.⁶⁷

The evidence before Congress showed that the loss of access to a public television station was particularly disturbing

⁶² Id. at 18, CR VOL. I.Z, EXH 140, CR 15302.

⁶³ Id. at 18-20, CR VOL. I.Z, EXH. 140, CR 15302-04.

⁶⁴ Id. at 20, CR VOL. I.Z, EXH. 140, CR 15034.

⁶⁵ Supplemental Comments of APTS and PBS in MM 90-4, at 15, CR VOL. I.P, EXH. H, CR 10802.

⁶⁶ Id. at 15, CR VOL. I.P, EXH. 64, CR 10802.

⁶⁷ Comments of Wyoming Public Television in FCC MM Docket 90-4 (Sept. 26, 1991), at 1, CR VOL. I.Q, EXH. 72, CR 11053.

because public television programming was paid for with public tax dollars and private contributions. For example, Donald Ledwig, then President of CPB, stated in a letter to Congressman Markey: "The American people should have access to the public television programs that they fund. If the FCC or the courts will not act to allow taxpayers cable access to the public television programs they fund, then I believe that Congress should."⁶⁸

On the basis of this and other evidence attesting to the loss of unique and diverse sources of noncommercial information to the public, Congress was clearly justified in concluding that must-carry for public television stations would serve a substantial government interest. As then-Senator Gore stated: "This minimal regulation surely is justified to further the Government's substantial interest in making sure that all Americans have access to the quality educational and informational programming which they support through their direct contributions as well as through their state and federal tax dollars."⁶⁹

⁶⁸ 1988 House Hearings, at 601, CR VOL. I.D, EXH. 9, CR 2688.

⁶⁹ 138 Cong. Rec. S595, CR VOL. I.EE, EXH. 198, CR 17136.

B. There Was Substantial Evidence Before Congress To Show That The Must-Carry Requirements for Public Television Stations Are Narrowly Tailored.

Section 5 is narrowly tailored to achieve the important government interests of preserving the financial viability of public television stations and promoting the widespread dissemination of information from a multiplicity of sources. In order to meet the "narrowly tailored" requirement under intermediate scrutiny, a regulation need not be the "least restrictive" or "least intrusive" means available. Ward v. Rock Against Racism, 491 U.S. at 798; see also Turner, 114 S. Ct. at 2469. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest," the regulation will be upheld even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800; see also Turner, 114 S. Ct. at 2469.

As described below, the evidence before Congress indicated that there is not a satisfactory alternative to must-carry regulation. Moreover, Congress carefully crafted the requirements of Section 5 to achieve its objectives with minimal burden on cable operators. The absence of a substantial burden on cable is confirmed by the 1990 agreement of the National Cable Television Association to provisions that are, for the most part, substantively identical to those ultimately enacted as Section 5.

1. Reliance on Over-the-Air Reception Is Not a Workable Alternative.

In theory, a cable subscriber whose cable system drops a public television station might be able to receive the station over the air and thereby continue to have access to those services. However, the evidence before Congress indicated that households that subscribe to cable realistically have access only to those public television stations carried on the cable system. Thus, reliance on the so-called "A/B switch" is not a satisfactory alternative to must-carry regulation.

The federal defendants and the commercial broadcasters present arguments regarding the inadequacy of the A/B switch in their briefs, and we incorporate those arguments by reference. In addition, there are separate reasons why the A/B switch is not a workable solution for public television stations in particular. The evidence before Congress showed that two-thirds of public television stations operate on the UHF band, "which is far more vulnerable to interference from the earth's contours and atmospheric disturbances than the predominantly commercial VHF band."⁷⁰ In addition, public television station transmitters are frequently located on state-owned property, which is more economical but may offer less powerful coverage than transmit

⁷⁰ 1992 House Report at 70, CR VOL. I.A, EXH. 4, CR 449; see also Comments of CPB, APTS and PBS in MM 85-349, at 20-21, CR VOL. I.BB, EXH. 163, CR 16003-04.

sites atop mountains or tall structures.⁷¹ In other instances, the station transmit sites are engineered to serve the maximum geographical area, frequently resulting in relatively weaker signals over the large population areas.⁷²

In light of public television's heavy dependence on UHF channels, Congress concluded in its discussion of must-carry for public television that "the availability of the A/B switch will not . . . provide a viable alternative to cable carriage since homes equipped with A/B switches may not be able to receive an adequate over-the-air signal even though they are within the station's service contour."⁷³ It was certainly reasonable for Congress to conclude that "over-the-air broadcasting by public television stations is not an answer," even if A/B switches (and outdoor antennas) were widely available and easier to use.⁷⁴

2. Several Important Features of Section 5 Limit the Must-Carry Obligations of Cable Operators.

Section 5 on its face reflects an effort to tailor narrowly the must-carry requirements for public television stations. At least three different features of Section 5 reduce the burden imposed on cable operators.

⁷¹ Comments of State Public Broadcasting Networks in MM 85-349, at 14, CR VOL. I.CC, EXH. 166, CR 16224.

⁷² Id.

⁷³ 1992 House Report at 70, CR VOL. I.A, EXH. 4, CR 00449.

⁷⁴ Id.

First, the number of public television stations that a cable operator must carry is limited, depending on the number of channels on the system. In general, systems with 12 or fewer channels are required to carry only one public television signal; systems with 13 to 36 channels must carry one but no more than three public television stations. Only systems with more than 36 channels must carry all public television stations that request carriage, and even this requirement is subject to certain limitations. 1992 Cable Act § 5(b)(1), (2), & (3).

Second, Section 5 has two provisions that guard against cable companies' having to carry duplicative programming. One provides that a cable operator that carries the signal of a station affiliated with a state public television network is not required to carry the signal of another station affiliated with the same network if the programming of the additional station is substantially duplicated by that of the station already carried. § 5(b)(3)(C). Another provision states that a cable operator with a capacity of more than 36 channels that is required to carry the signals of three public television stations need not add the signals of other stations if their programming substantially duplicates that of the stations already receiving carriage. § 5(e).⁷⁵

⁷⁵ In any events, the evidence before Congress showed that there was in fact little risk of duplication. See 1988 House Hearings at 597, CR VOL. I.D, EXH. 9, CR 02684; 1990 House Hearings at 96, CR VOL. I.I, EXH. 16, CR 06263. See also 1989

Finally, Congress sought to minimize the burden on cable operators through the "PEG" channel provision. Under the Cable Communications Policy Act of 1984, franchise authorities were permitted to reserve certain cable channels for public, educational, or governmental use. 47 U.S.C. § 531 (1988). There was evidence that a number of these "PEG" channels were not being used.⁷⁶ Section 5 provides that if the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a PEG channel if that channel is not being used for its designated purpose, subject to the approval of the franchising authority.⁷⁷ To the extent the cable operator has unused PEG channels, it can fulfill its obligation without any burden at all.

There was also evidence that a must-carry requirement for public television stations would impose only a minimal burden on the cable industry. Data made available to Congress showed that a requirement for carriage of all substantially unduplicated public television programming would have the following effects:

Senate Hearings at 105-06, CR VOL. I.F, EXH.12, CR 04115-16 (examples of different programming offered by public television stations located in Chicago, Miami, Washington, D.C., and New Orleans).

⁷⁶ 138 Cong. Rec. H6554 (July 23, 1992) (remarks of Rep. McMillen), CR VOL. I.EE, EXH. 195, CR 17128.

⁷⁷ 1992 Cable Act § 5(d); see also 1992 House Report, at 100, CR VOL. I.A, EXH. 4, CR 00481.

- 84 percent of the nation's cable systems would be required to carry one public television station;
- 13 percent would be required to carry two public television stations; and
- 3 percent would be required to carry more than two public television stations, and all of those cable systems are located in seven large television markets: New York City, Los Angeles, Chicago, San Francisco, Boston, Washington, D.C. and New Orleans.⁷⁸

As Congress correctly concluded, these effects would impose very little burden on cable.⁷⁹

3. NCTA's Endorsement of the 1990 NCTA-APTS Must-Carry Agreement Confirms that Section 5 Does Not Impose a Significant Burden on the Cable Industry.

If there were any doubt about the minimal nature of the burden Section 5 imposes on cable, it should be dispelled by the fact that NCTA, the leading cable trade association, agreed to almost all of the provisions that ultimately were included in Section 5. In 1990, NCTA and APTS negotiated an agreement on a legislative proposal for must-carry limited to public television stations. Except for the channel repositioning provision, which was added later, the provisions of Section 5 were essentially the same as those agreed to by NCTA.⁸⁰

⁷⁸ Id. at 71, CR VOL. I.A, EXH. 4, CR 00450.

⁷⁹ See id. at 68, CR VOL. I.A, EXH. 4, CR 00447.

⁸⁰ The channel repositioning provision certainly does not result in a regulation that is "substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 800. As an initial matter, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. They are quintessential

NCTA and APTS presented their agreement to Congress, and it was quickly introduced as H.R. 4415.⁸¹ James Mooney, President of NCTA, subsequently described the agreement as "a workable compromise guaranteeing that public television will remain an integral part of cable's basic programming package."⁸² Congressman Rinaldo, a cosponsor of H.R. 4415, described the agreement as one that "is fair to both sides and benefits both sides. Most of all it benefits the public, who will be assured of receiving the public television which their tax dollars support."⁸³

C. The Evidence Was Sufficient for Congress To Infer That Must-Carry for Public Television Stations Was Both Necessary to Advance Important Governmental Interests and Narrowly Tailored.

structural regulations. At most, the channel positioning requirements are a reasonable time, place and manner restriction. Viewed (charitably) in that light, and in view of the harm that can result from repositioning (see pages 34-35, 42 n.58, supra), the channel positioning provisions of Section 5 are clearly justified.

⁸¹ See 136 Cong. Rec. H6057, H6071 (March 29, 1990) (included in Volume 5 of the Appendix to this memorandum); 1990 House Hearings, at 150, CR VOL. I.Z, EXH. 16, CR 06317.

⁸² Id. at 151, CR VOL. I.I, EXH. 16, CR 06318; see also Cable TV Consumer Protection Act of 1989: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 70 (1990) ("1990 Senate Hearings"), CR VOL. I.H, EXH. 15, CR 05644 (statement of James Mooney).

⁸³ 1990 House Hearings, at 87, CR VOL. I.I, EXH. 16, CR 06524.

As the Supreme Court plurality noted, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic" as must-carry. Turner, 114 S. Ct. at 2471 (opinion of Kennedy, J.) (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)). This remand proceeding does not constitute "a license to reweigh the evidence de novo, or to replace Congress' factual predictions with [the Court's] own." Id. at 2471 (opinion of Kennedy, J.). The only question is whether Congress drew "reasonable inferences" based on "substantial evidence" that the must-carry provisions would "in fact advance [the important governmental] interests" supporting the legislation and that it was narrowly tailored to do so. Id. at 2471, 2470. The answer to that question is clearly yes.

On the basis of the extensive evidence before it, it was reasonable for Congress to infer that must-carry of public television stations was necessary to advance important governmental interests. As discussed above, that evidence showed that cable companies had dropped, denied carriage to, or repositioned public television stations in significant numbers, and that these numbers were likely to increase as the cable industry matured. Congress could reasonably infer that the loss of access by cable households would lead to a loss in membership contributions and other financial support, and, ultimately, to impaired financial

viability for public television stations. More significantly, it was reasonable to conclude that when a cable system dropped or repositioned a public television station, the governmental interest in universal access and in promoting widespread dissemination of information from a multiplicity of sources was frustrated. Finally, Congress could reasonably conclude that Section 5 is not substantially broader than necessary to secure these important governmental interests.

There is no reason to second guess Congress's inferences from the substantial evidence discussed above. On the basis of the congressional record alone, the Court can conclude that Section 5 is consistent with the First Amendment and that summary judgment on that point is appropriate.

II. THE EVIDENCE DEVELOPED ON REMAND CONFIRMS THE CONSTITUTIONALITY OF MUST-CARRY FOR PUBLIC TELEVISION STATIONS.

The evidence developed on remand, while not necessary to sustain the constitutionality of Section 5, confirms that Congress drew reasonable conclusions concerning must carry requirements for public television stations and that summary judgment for the public broadcasters should be granted.

A. The Additional Evidence Confirms that the Must-Carry Requirements for Public Television Stations Serve Important Governmental Interests.

1. There Are Substantial Governmental Interests in Ensuring That All Diverse Public Television Services Are Available on Cable Systems.

The evidence developed on remand confirms that cable carriage of public television stations promotes the congressional goals of universal access to public television services and widespread dissemination of multiple information sources.

In his declaration, Peter Downey, PBS's Senior Vice President for Program Business Affairs, explains the central importance to public television of the principle of universal access. Public television officials have long been guided by the goal articulated in the Public Broadcasting Act of 1967 -- that all Americans should have access to public television. Downey Decl. ¶¶ 11-12. Among other things, public television stations have taken the lead in developing access-enhancing programming, such as English as a second language, closed captioning services, and descriptive video services for the visually impaired. See Brugger Decl. ¶ 9.

As Mr. Downey explains, cable carriage has played a crucial role in extending the reach of public television. Downey Decl. ¶¶ 17-19. Mr. Downey confirms that public television is particularly dependent on cable carriage because almost two thirds of public television stations are assigned to the UHF portion of the broadcast spectrum and therefore have more limited

over-the-air reception. Cable carriage allows public television stations to overcome this "UHF handicap." Id.

The evidence on remand also dispels any notion that carriage of a single public television station in a market provides access to the full range of diverse public television service. Each public television station is a unique local institution. Some stations are affiliated with universities and some with local school boards, others are under the auspices of a state government, and others are associated with a community nonprofit organization. Each station exercises local control over programming decisions. Thus, while most stations acquire some programming from PBS and other regional or national sources, each station makes its own decisions on what to broadcast and when, tailoring the mix of programs to the special needs and interests of the local community. Downey Decl. ¶¶ 13-15; Brugger Decl. ¶ 7. Moreover, on an annual basis, public television stations produce almost 64,000 hours of local programming, including locally oriented news and public affairs programs, instructional programming, outlets for local cultural groups, and coverage of local and state government activities. See Brugger Decl. ¶ 7.

Where two or more public television stations serve a single market, they typically offer very different program choices. Indeed, stations located in the same area typically seek to fill distinct niches, offering differentiated services.

Downey Decl. ¶¶ 13-15; Brugger Decl. ¶ 6.⁸⁴ The Washington, D.C. area, for example, is reached by an unusually large number of public television stations, due to the overlap of two major television markets. However, each of these stations provides a unique service that addresses the needs of different audiences in the area: (i) WETA, the largest, offers mainstream PBS programming to a general audience; (ii) WHMM, licensed to Howard University, offers programming oriented to African-American audiences; (iii) WNVC in Northern Virginia offers a broad variety of foreign language programming geared towards an international clientele; (iv) WNVU, a sister station to WNVC, offers primarily instructional television services; and (v) WMPT/Annapolis, a transmitter operated by Maryland Public Television, provides many programs with a focus on Maryland. See Downey Decl. ¶ 14.

The public television station managers whose declarations have been filed in this case confirm that their stations offer unique, locally oriented programs that differentiate them from other stations in the area.

- The general manager of KCSM, licensed to San Mateo County Community College in California, explains that almost half of the station's programming consists of college credit telecourses that are unique to it. KCSM seeks additional ways to differentiate its services from those of other San Francisco area public television stations. KCSM has targeted its programming to minorities, single mothers, people who speak English as

⁸⁴ PBS programming acquisition policies affirmatively encourage differentiation among public television stations located in the same market area. See Downey Decl. ¶ 15.

a second language, and people who want to learn foreign languages. Hosley Decl. ¶¶ 3, 5, 6.

- KRSC, located in Claremore, Oklahoma (northeast of Tulsa), is affiliated with Rogers State College. KRSC has very different programming from KOED, the Tulsa affiliate of the Oklahoma state educational television network. While KOED is a PBS member, KRSC is not. A large percentage of KRSC's broadcast schedule consists of telecourses originating from Rogers State College and "live" interactive instructional programming, as well as locally produced programs on subjects such as consumer affairs, Native American matters, humanities, writing, and local sports. Smith Decl. ¶¶ 3, 4.
- WNPB, in Morgantown, West Virginia, provides coverage of the West Virginia state legislature, offers local programs that draw on the resources of West Virginia University, and provides instructional programming to 65,000 students in area schools, distinguishing its programming from that of stations in neighboring states. Lewis Decl. ¶¶ 3, 4.
- Even two "mainstream" public television stations located in the same state -- WTVS in Detroit and WKAR in East Lansing -- offer some different programming. WTVS airs a number of programs that are focused on Detroit and are designed to meet the needs of an urban population (such as Project Literacy and Project Graduation), while WKAR provides coverage of the Michigan state legislature and Michigan State University activities. Alpert Decl. ¶ 3; Meuche Decl. ¶ 3.

The additional evidence confirms not only that public television provides an important alternative to commercial television programming, but also that there is considerable diversity among the programming presented by public television stations located in the same area. Ensuring that all Americans, whether cable subscribers or not, have access to all of their local public television stations and that all of these stations remain financially viable clearly serves the government's interest in

promoting the widespread dissemination of multiple sources of information.

2. Public Television Stations Are Especially Vulnerable to Non-Carriage by Cable Systems.

Dr. Roger Noll confirms the evidence before Congress -- that cable operators have economic incentives to drop or reposition both commercial and noncommercial local broadcast stations.⁸⁵ A cable operator may have an incentive to carry the primary public television station in a market, in order to attract potential subscribers who want access to public television. However, the operator is likely to regard a secondary public television station as far less economically attractive, especially compared with cable services that are under common ownership with the operator or that offer extra revenue in exchange for carriage.⁸⁶ Thus, despite the fact that a

⁸⁵ In his declaration, Dr. Noll provides an extensive and detailed analysis of the economic theory supporting this conclusion. He explains that cable operators' incentives to drop or reposition broadcast stations have increased since 1992. See Noll Decl. ¶¶ 7-35. See the brief filed by the federal defendants for a more complete discussion of Dr. Noll's expert testimony.

⁸⁶ Public television stations do not provide a stream of revenue for the cable system. As non-profit entities, public television stations are not in a position to pay substantial sums for carriage on cable. Nor does a public television station offer the cable operator any equity interest or opportunity to earn local advertising revenues. See Brugger Decl. ¶ 37 & Ex. 7 (Letter from Fred Esplin, Associate Director of the Utah Network, to Senator Jake Garn, "When requesting access for KULC, we are told directly that profit-generating cable channels take precedence over an educational channel."); Alpert Decl. ¶ 5 (United Cable's shift of WTVS, Detroit, to a higher channel to

secondary public television station provides a unique information source, a cable operator is likely to regard it as expendable when a more attractive revenue opportunity comes along. See Noll Decl. ¶ 29; Brugger Decl. ¶ 37.

The evidence introduced on remand confirms Congress' judgment that public television stations experienced substantial numbers of drops and channel shifts by cable companies during the years after the must-carry rules were struck down; indeed, it indicates that the figures presented to Congress were significantly understated. The evidence also shows that during that period many stations were simply unable to obtain carriage on cable systems.

From 1985 to 1992, APTS regularly gathered information from public television stations about their cable carriage experiences. APTS surveyed its member stations periodically and compiled lists of the drops and channel shifts that were reported by station personnel. In addition, from time to time station personnel consulted APTS staff about cable carriage developments and forwarded to APTS correspondence and other documents relating to cable carriage. In 1987, APTS began to make systematic efforts to verify the information it received. For example, APTS staff called cable companies in an attempt to verify whether a

make room for CNN "is consistent with the general cable industry practice of placing a cable programmer in which it has a financial interest on a low channel and placing advertising on that channel.")

drop had actually occurred and, if so, whether it was still in place. Brugger Decl. ¶ 15.

One list compiled by APTS personnel, attached as Exhibit 3 to Mr. Brugger's declaration, indicates that, from 1986 through September 1989, APTS had received reports of 74 verified drops and 128 verified channel shifts of public television stations and 32 drops and 56 shifts that APTS had not yet verified. See Brugger Decl. ¶ 16 & Ex. 3. Another list, compiled from station responses to a 1991 APTS survey and attached as Exhibit 4 to Mr. Brugger's declaration, indicates that stations had reported 16 drops from a cable system within 50 miles (or within the station's Grade B contour), 21 channel shifts, and many other threatened drops or instances in which a station had been restored following a drop or shift. See id. at ¶ 17 & Ex. 4.

More recently, APTS has assembled a "master list," which consolidates information on Exhibits 3 and 4 of the Brugger declaration and supplements it with newly compiled information contained in contemporaneous documentation from APTS files. Id. ¶¶ 18-19.⁸⁷ That list, attached as Exhibit 6 to Mr. Brugger's declaration, shows 130 drops and 203 channel shifts that were

⁸⁷ Before adding entries to the list, APTS staff made efforts to confirm that the cable systems listed met either the 50-mile or the Grade B contour criterion contained in the definition of "local public television station" in the 1992 Cable Act. Id. ¶ 19.

reported by public television stations to APTS over the period from 1986 to 1992. The information APTS was able to collect from the stations is not comprehensive; it reflects only drops or shifts of which stations became aware and that they then communicated to APTS. Id. ¶ 20.

In addition, following the remand, defendants have identified additional cable carriage data that demonstrate that the 1988 FCC Survey that was before Congress likely substantially underestimated the scope of the drop/non-carriage problem. Meek Decl. ¶ 5. Using cable carriage data compiled by Cable Data Corporation,⁸⁸ Mr. Meek, one of defendants' experts, determined that the actual number of drop incidences that had occurred as of June 30, 1988 (the time the FCC survey was conducted) was likely closer to double that suggested by the FCC survey. Id. ¶ 11. He also compared the CDC data -- showing the number of dropped stations and the number of cable systems that had dropped stations -- with the FCC survey data and determined that by either measure the FCC survey understated the actual problem. Id. ¶¶ 13-16.⁸⁹

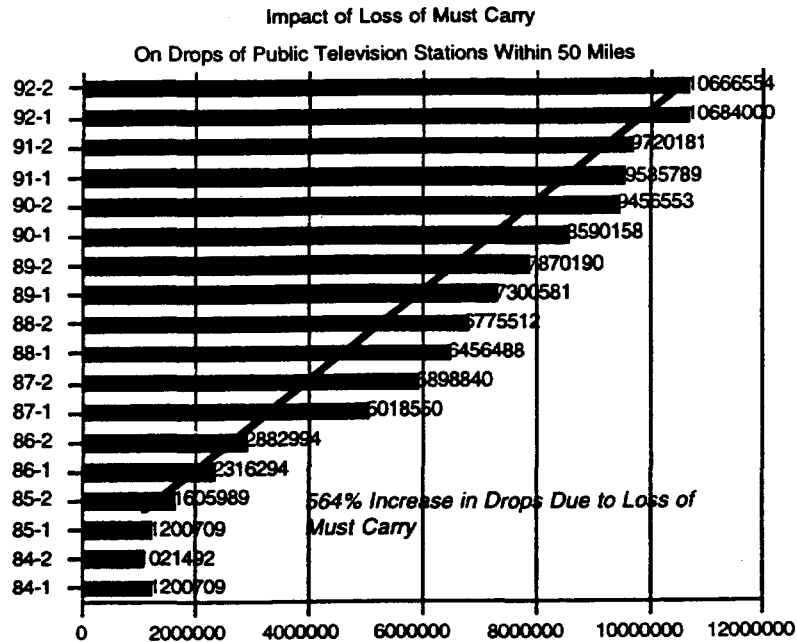
⁸⁸ Data collected and maintained by Cable Data Corporation ("CDC") are taken from forms filed by cable systems with the Copyright & Licensing Division of The Library of Congress at the end of each six-month period. For a description of the database maintained by CDC, see id. ¶¶ 24-32. The CDC database is the best historical source for national cable carriage information concerning broadcast stations. Id. ¶ 29.

⁸⁹ For a complete description of this analysis, see id. ¶¶ 5-17.

The CDC data show that after the 1988 FCC Survey the problem grew steadily worse. The data indicate that, by the end of 1992, 314 public television stations were dropped from carriage by 1,616 different cable systems. Feldman Decl. ¶ 11.⁹⁰ Moreover, by 1992 public television stations had lost access to more than 10 million cable subscribers as a result of these drops. Id. ¶ 12. This reflects more than a five-fold increase in the number of cable subscribers who lost access to public television stations from the time the must carry regulations were struck down in 1985 through the end of 1992. Id. A graph showing the loss of potential viewers over time due to cable drops of public television stations, as reflected in the CDC figures, appears on the following page.⁹¹

⁹⁰ These data reflect drops by cable systems located within 50 miles of the public television stations dropped. Id. ¶ 9.

⁹¹ These figures omit instances of noncarriage (i.e., situations in which a cable system never carried a public television station). CDC figures indicate that, by early 1992, public television stations had been denied access to over 35 million cable subscribers as a result of noncarriage. Meek Decl. ¶ 55 & Ex. F. Even adopting a conservative assumption that only half of this loss resulted from situations that would be addressed by the current must-carry provisions, the numbers are still powerful evidence that public television stations are highly vulnerable to adverse carriage actions.



Source: Feldman Decl. ¶ 12 & Illustration 2.

The nationwide statistics tell only part of the story, however. As examples of the cable carriage experiences of public television stations since 1985, the public broadcasters have submitted the declarations of 12 public television station managers. These witnesses represent a range of public television stations of various sizes, located throughout the country and affiliated with a wide variety of licensees. The stations include both primary stations and second or third stations in a market.

All of the stations for which declarations have been submitted experienced some form of adverse cable carriage action. The following are examples of incidents discussed at greater length in the declarations.

- Iowa Public Television stations were shifted to cable channels that caused reception difficulties for viewers in Sioux City and Dubuque County. Other IPTV stations were dropped from cable systems in Illinois cities just over the Iowa border. Malloy Decl. ¶¶ 6, 7, 9.
- KRSC in Claremore, Oklahoma, had difficulty obtaining carriage on larger cable systems within its coverage area, including systems in nearby urban areas such as Tulsa and Bartlesville. Smith Decl. ¶¶ 6, 8.
- KCSM of San Mateo, California, was dropped from large numbers of cable systems in the San Francisco Bay Area between 1986 and 1991. Hosley Decl. ¶¶ 9, 11.
- WNPB in Morgantown, West Virginia, was dropped from the cable system in Uniontown, Pennsylvania, and was shifted to a higher channel on cable systems in Wheeling and Morgantown. Lewis Decl. ¶¶ 7, 10, 11.
- WTVS in Detroit, Michigan, was shifted from channel 6 to channel 56 or channel 51 on various cable systems in the Detroit suburbs. Alpert Decl. ¶¶ 5, 8.⁹²

The CDC data also show that new stations that came on the air when no must carry rules were in effect encountered particular difficulty in obtaining carriage. New educational stations were not being carried by systems within 50 miles serving 71% of cable households in their ADI markets. Meek Decl. ¶¶ 19, 71.

These new stations succeeded in obtaining carriage on many cable systems after 1992. For example, KRSC, which began broadcasting in 1987, was added to cable systems serving 57 new communities following must-carry. Smith Decl. ¶¶ 6, -8 & Ex. 1. WCEU, in Daytona Beach, Florida, which went on the air in 1988,

⁹² See also Brugger Decl. Ex. 6 for many additional reports received by APTS.

gained access to more than 850,000 additional viewers following must-carry. Thigpen Decl. ¶ 7. WEIU, in Charleston, Illinois, which started up in 1986, obtained carriage on cable systems in approximately 20 additional communities, resulting in access to approximately 50,000 additional cable subscribers. Beabout Decl. ¶ 8. Prior to must-carry, WKYU in Bowling Green, Kentucky (which started up in January 1989), was carried on only four cable systems. Since 1992, it has added 17 cable systems with a potential audience of over 25,000 subscribers. Anderson Decl. ¶ 8.

In sum, the new evidence makes clear that the figures provided to Congress and the FCC represented a significant understatement of the volume of drops, noncarriage, and channel shifts experienced by public television stations during the 1985-1992 period.

After the reimposition of must carry rules at the end of 1992, the steady increase in subscriber drops began to reverse itself. By one year after must carry obligations were reinstated (December 1992 for public television stations), the number of subscriber drops had decreased by about one-third. Feldman Decl. ¶ 15. Despite this trend, by mid-1994 there were still over seven million cable subscribers that did not have access to public television stations that would qualify for carriage. Id. ¶ 15 & Illustration 2. Both Mr. Feldman and Mr. Meek attribute this continued noncarriage of public television stations to

improper denials of carriage and the inability of resource-strained public television stations to challenge even baseless denials of carriage. See Feldman Decl. ¶ 16; Meek Decl. ¶ 59.

These opinions are consistent with the experience of the public television station witnesses. All but one of these witnesses who attempted to exercise must carry rights reported some resistance by cable systems to their requests for carriage and channel positioning.⁹³ For example, it took "a relentless campaign" and "months of discussions and delays" before some cable systems agreed to carry KRSC in Claremore, Oklahoma. Smith Decl. ¶ 7. In a number of instances, cable systems improperly claimed that the station did not deliver a good quality signal, which delayed carriage. See, e.g., Anderson Decl. ¶ 7; Meuche Decl. ¶ 14.

Cable resistance made it necessary for many public television stations to file complaints with the FCC. For example, Greater Dayton Public Television, the licensee for stations located in Dayton and Oxford, Ohio, spent many months corresponding and negotiating with cable systems. Ultimately, Greater Dayton found it necessary to file 40 complaints with the FCC to enforce its rights to carriage and/or channel position. Out of 40 complaints, Greater Dayton was found to be entitled to

⁹³ See Anderson Decl. ¶ 7; Alpert Decl. ¶ 7; Beabout Decl. ¶ 8; Dial Decl. ¶ 10; Fogarty Decl. ¶ 6; Hosley Decl. ¶ 15; Lewis Decl. ¶ 13; Meuche Decl. ¶ 14; Smith Decl. ¶ 7; Thigpen Decl. ¶ 6.

carriage (assuming it delivered a good quality signal) in 39 cases. The FCC also ruled in 33 cases that the cable company was required to carry the station on the channel requested. Fogarty Decl. ¶ 7.⁹⁴ Other public television stations also found it necessary to file complaints to obtain carriage. See, e.g., Hosley Decl. ¶ 15; Meuche Decl. ¶ 15; Dial Decl. ¶ 10.⁹⁵

As of May 1, 1995, twenty-eight public television stations had filed 175 complaints with the FCC to enforce their must carry rights. Of the 170 complaints that have been resolved, the Commission has granted carriage, or the complaint has been dismissed because the cable company agreed to carriage, in 135 instances (or almost 80% of the cases). See Brugger Decl. ¶ 34.

The resistance cable operators have shown to carriage of public television stations reinforces Congress' earlier conclusions about the operators' incentives. If the operators so aggressively stonewall public television stations while Section 5 is on the books, the Court can surely infer that massive numbers

⁹⁴ Six of the complaints were dismissed voluntarily after the cable company belatedly agreed to Greater Dayton's request. The FCC rescinded five of the carriage orders after Greater Dayton agreed that it did not deliver a good quality signal and that it was not cost effective to bolster its signal at that time. Id.

⁹⁵ Some stations faced with cable resistance have not pursued the matter further because they lacked the resources to do so. See Lewis Decl. ¶ 13; Beabout Decl. ¶ 11.

of drops and shifts would occur in the absence of must-carry protection.

As explained in the declarations of Mr. Brugger and Mr. Downey, the public television industry in fact has been most concerned with the potential for future cable actions. See Brugger Decl. ¶ 37; Downey Decl. ¶¶ 30-32. The brief of the commercial broadcasters describes substantial evidence developed on remand showing that the cable industry was exercising self-restraint during the 1985-1992 period. This is consistent with the perception of public television officials. APTS understood that the NCTA was explicitly instructing its members to refrain from taking action against public television stations. Brugger Decl. ¶ 25. Indeed, NCTA staff worked with APTS staff in an effort to head off or reverse drops or shifts of public television stations during this period. Id. ¶ 32.⁹⁶ It is fair to assume that in a world with no prospect of imminent must-carry regulation the cable industry would feel no constraints and would be free to act on the growing incentives to drop or reposition public television stations in favor of cable services.

⁹⁶ See also tab T of Volume 5 of the Appendix to this memorandum (document number N000570).

3. Must-Carry Serves the Interests of Avoiding Financial Harm to Public Television Stations and Preserving Universal Access to Noncommercial Information Sources.

The evidence developed on remand confirms Congress' judgment that must-carry serves important government interests in protecting the financial health of public television stations and preserving universal access to the diverse information sources public television offers.

The additional evidence confirms that if a public television station is not carried by a cable system, subscribers to that system generally will not have meaningful access to that station. In his declaration, Mr. Downey explains some of the difficulties a cable subscriber would experience in receiving a public television station over the air. Approximately two-thirds of public television stations operate in the UHF band, which puts them at a significant disadvantage in terms of quality of over-the-air reception. Public television stations, as non-profit entities, often are unable to justify the cost of operating at a higher power level, which could partially mitigate the UHF handicap. Public television stations also suffer from the fact that their transmission towers are frequently situated well away from commercial towers serving the same community, so that (assuming they have them at all) viewers' antennas are likely to be oriented in another direction. Downey Decl. ¶¶ 17-19.

This is not simply a theoretical point. For a whole variety of reasons, whether technical or behavioral, the reality is that cable subscribers generally do not view a public television signal over the air once it has been dropped from their cable system. Several station managers explain in their declarations that their own experience confirms that cable subscribers whose system no longer carries their station are not likely to receive it over the air. See Malloy Decl. ¶¶ 6, 14; Dial Decl. ¶ 12; Meuche Decl. ¶ 19. See also Downey Decl. ¶ 20.

Analysis of viewership data from before and after the must carry provisions went into effect confirms the relationship between cable carriage and viewership. Mr. Feldman, one of defendants' expert witnesses, analyzed such data and found that

[REDACTED]

Mr. Feldman also performed a statistical analysis that indicated a statistically significant positive correlation between changes in carriage and changes in viewership ratings during that period. Feldman Decl. ¶¶ 19-21. Mr. Meek reached consistent conclusions after performing a similar analysis of viewership ratings for non-primary educational stations. Meek Decl. ¶ 97. See also Rohlf's Decl. ¶¶ 6, 8-33 (describing statistical study showing that cable drops have a substantial adverse effect, and cable

adds have a substantial beneficial effect, on broadcast station viewership ratings).

The station witnesses also explain why an involuntary shift to a less desirable channel can cause viewers to lose access to a public television station. The experience of these witnesses confirms that the station often loses viewers as a result of such shifts. Reasons include viewer confusion, poor reception on certain channels, lack of equipment needed to access channels in a higher tier, and viewer scanning and sampling habits. See, e.g., Alpert Decl. ¶¶ 5, 9; Malloy Decl. ¶¶ 6, 8; Lewis Decl. ¶¶ 6, 10, 11. See also Downey Decl. ¶ 21. While there may be theoretical arguments that cable subscribers can continue to view a public television station following a drop or shift, experience indicates that most either cannot or do not.

The evidence further establishes that the loss of cable carriage (through either drops, noncarriage or shifts) results in financial injury to public television stations. As explained by Jonathan Abbott, PBS's Senior Vice President for Development and Corporate Relations, viewer contributions and support from corporations and foundations are crucial revenue sources for public television. Abbott Decl. ¶¶ 4, 7, 30. Individual donations (including membership contributions and auction revenue) have become an increasingly important funding source in recent years. Such donations now constitute public television's single largest revenue source, totalling more than 22.8 percent

of the financial support for public television from all sources in fiscal year 1992. Individual donations typically are the most stable and reliable income source for public television stations. Retaining long-term donors is critical to a station's financial health. If federal support is substantially cut back, as has recently been proposed in Congress, individual donations will take on even greater significance. See id. ¶¶ 4, 7-8.

Mr. Abbott's declaration explains that a public television station's ability to obtain donations from individuals and to sustain contributions from retained members depends primarily on the station's access to viewers. When a public television station loses access to a given number of households, it will lose a number of viewers and, hence, individual contributions from those viewers. Abbott Decl. ¶¶ 5, 9-11. This is consistent with Dr. Noll's analysis: "Noncommercial broadcasters need revenue to pay for their programs, and they derive revenue from contributions by viewers, nonprofit institutions, and corporations. These revenues are greater if the audience reached by the station is larger." Noll Decl. ¶ 38.

If the loss of access is significant, the resulting loss in contributions could have a substantial adverse effect on the station's ability to operate. See Abbott Decl. ¶¶ 5, 11-15. Similarly, a shift of the station to a less desirable channel may result in viewership loss, which in turn affects individual contributions. Id. ¶¶ 12-13. See also Brugger Decl. ¶ 26. In

his declaration, Mr. Abbott provides a model for estimating loss in viewer contributions as a result of loss of access to cable households. Even with the application of conservative assumptions, the model suggests that the aggregate dollar contributions to public television stations that were potentially lost in fiscal year 1992 as a result of cable drops were at least in the range of \$6 million. Abbott Decl. ¶¶ 16-25.

Underwriting and foundation grants have also become increasingly important funding sources for public television. In fiscal year 1992, corporate underwriting and other business support totaled nearly 17 percent of the financial support for public television from all sources. Id. ¶ 30. As in the case of individual contributions, the ability of a public television station to obtain underwriting and other business support depends largely on the station's access to audiences. When a drop or channel shift results in significant viewer loss, the station's ability to attract corporate underwriting will be jeopardized because businesses are less inclined to underwrite a station's programming if that programming will not be available to sizeable audiences that include potential customers for the business. See id. ¶¶ 31-33.

The experience of KRSC in Claremore, Oklahoma, confirms Mr. Abbott's testimony about the relationship between cable carriage and underwriting revenues. KRSC, which obtained coverage on almost 60 new cable systems following must-carry, has

gained at least 20 new underwriters, and underwriting revenues have approximately tripled. The new underwriters included Coca-Cola, the first national underwriter the station had ever had. Several of the station's new underwriters are Tulsa-based companies that received their first exposure to KRSC after Tulsa Cable (TCI) provided full carriage pursuant to must carry. Smith Decl. ¶ 9.

The revenue loss that results from a public television station's loss of access to cable subscribers has an adverse effect on the station's ability to provide high quality programming. Mr. Downey explains in his declaration that, because programming costs are for the most part variable, a station's programming budget is more sensitive to financial reversals than almost any other station activity. Any significant diminution in revenues will likely translate to a reduction in the programming budget, and thus a direct reduction in the quantity and/or quality of the programming provided by the station. Downey Decl. ¶¶ 24-25.

Moreover, as Mr. Downey explains, significant revenue losses at even a limited number of public television stations have the potential to affect the health of the entire public television system. This is due to the cooperative arrangement for financing of the PBS National Program Service ("NPS"). A station that suffers a significant revenue loss as a result of an adverse carriage action may eventually have to reduce its level

of participation in the NPS to cut expenses. When this occurs, the total amount available in the cooperative fund that supports national programming is reduced. Ultimately, such reductions will lead to a decline in the quantity and/or quality of programming available to all public television stations. Id. ¶¶ 26-27, 29, 33.

Evidence provided by public television station managers confirms the expert opinions expressed by Messrs. Noll, Abbott, and Downey. In their declarations, these station managers report that adverse cable actions result in tangible financial harm. At the most fundamental level, following a drop or a shift, it is common for members who can no longer receive the station's signal to advise the station that they will no longer contribute.⁹⁷

For the most part, public television stations do not have the resources to quantify the financial effect of each drop or shift they experience. See Malloy Decl. ¶ 13; Alpert Decl. ¶ 13; Lewis Decl. ¶ 14. However, some stations have attempted to perform such analysis and have identified significant losses. For example, following a series of drops by Viacom in 1986 and 1989, KCSM personnel calculated that the station had lost approximately 2,000 members and membership

⁹⁷ See Meuche Decl. ¶¶ 7, 9 & Exs. 2-5 ("Unfortunately our Cable no longer carries your programs, so I will no longer be sending a contribution. I shall miss them!"); Malloy Decl. ¶¶ 7, 8, 10 & Ex. 5 ("We're sorry not to renew our participation in [Friends of Iowa Public Television], but we no longer receive the Iowa City station as part of our Cable lineup.").

revenue of approximately \$90,000 per year as a result of the drops. Hosley Decl. ¶ 9, 12 & Ex. 3. After WestMarc Cable in 1991 dropped WKAR from its system in Battle Creek, Michigan, a number of Battle Creek viewers cancelled their memberships because they could no longer receive the station. The station manager estimated that WKAR had previously received over \$38,000 in annual contributions from this area. Within a year, membership dropped from 592 to 30 in the Battle Creek area. Meuche Decl. ¶ 10.

The impact that a substantial drop can have on a public television station is well illustrated by Vermont ETV's experience.⁹⁸ In late 1989, the Videotron cable system in Montreal, with 600,000 subscribers, decided to drop the Vermont ETV signal due to the effects of new Canadian copyright rules. Vermont ETV recognized the seriousness of this move for its financial health and responded immediately by instituting budget cuts of \$400,000 each for fiscal years 1990 and 1991. Vermont ETV management undertook major efforts to help find a solution to the problem that had led to the drop, and in January 1991 the Vermont signal was restored to the Videotron system. In the meantime, however, Vermont ETV lost more than \$150,000 in Canadian viewer contributions. In 1989, Canadian viewers donated \$935,322; in

⁹⁸ While the drop in question occurred outside the United States, it shows the sort of financial effects adverse cable actions can have on public television stations.

1990, Canadian contributions dropped to \$779,210; and in 1991, after the Vermont ETV signal was restored to the Videotron system, Canadian contributions rose to \$1,020,598. According to the President of Vermont ETV, the loss in contributions would have been far greater except for the facts that the drop lasted only one year and that Videotron subscribers were aware that Vermont ETV was fighting hard to regain carriage. Green Decl. ¶¶ 5-12.

Station managers have also found that involuntary shifts of public television stations lead to losses in station revenue. For example, in 1987, the cable company in Wheeling, West Virginia, shifted WNPB to a higher channel, which made it impossible for a number of viewers to receive the station. Although the cable company said it would provide converter boxes for viewers who needed them, there was a delay of many months before the equipment was available. As a result, WNPB suffered a 46 percent drop in membership and a 36 percent drop in revenue from the Wheeling area. Lewis Decl. ¶ 10. In mid-1987, a TCI system shifted an Iowa Public Television station to a higher channel in several communities in Dubuque County. Following the March 1988 pledge drive, IPTV officials noted that membership revenue increases for that area were 75 percent below the statewide increase. Moreover, from the March 1987 pledge drive to the March 1988 pledge drive, the number of contributors from Dubuque County stayed flat, while the number of contributors

increased by 16 percent on a statewide basis. Malloy Decl. ¶ 6 & Ex. 1.

The financial loss resulting from inability to obtain carriage on cable systems can also be seen through evidence of the benefits public television stations began to receive after they were added to or restored to cable systems following enactment of the must-carry provisions. As described above, KRSC, which obtained carriage on cable systems serving 57 new communities following must-carry, has more than tripled its underwriting revenues as a result of its increased coverage. Smith Decl. ¶ 9. WNPB of Morgantown, West Virginia, which was restored to the cable system in Uniontown, Pennsylvania, following must-carry, has since received \$85,000 in grants and donations from a single Uniontown viewer. Lewis Decl. ¶ 14. WEIU of Charleston, Illinois, obtained carriage on cable systems in approximately 20 new communities, including Time Warner's Champaign/Urbana system with nearly 50,000 subscribers.

[REDACTED]

Membership contributions more than doubled and underwriting revenues more than tripled in the same time period. Beabout Decl. ¶ 9.

Finally, the additional evidence shows that even small financial losses suffered by public television stations as a

result of loss of cable carriage are significant to the health of public television. As non-profit institutions, public television stations operate close to the margin; any substantial loss of funds has some effect on a station's ability to fulfill its mission. See Downey Decl. ¶ 25. Likewise, gain of an amount of revenue that is relatively modest by commercial standards as a result of new cable carriage can provide an opportunity for a public television station to expand its offerings and take advantage of new programming opportunities. See Smith Decl. ¶ 13 (increase in underwriting revenues following must carry permitted expansion of telecourse schedule and requests to create new local programs).

Of course, the real concern for the financial health of public television arises from the expectation that the volume of drops and shifts, and the resulting revenue loss, would be much higher in a world with no threat of must-carry regulation than it was in the 1985-1992 period. The evidence of past financial effects from adverse carriage actions, accompanied by the expectation of a much more substantial revenue loss in the future, provides ample support for a determination that a must-carry statute would help to prevent future financial harm to public television stations, thereby protecting the financial health of those stations.

Finally, new evidence confirms that, absent must carry, there was harm to the government's interest in access to diverse

information sources. Mr. Feldman's declaration shows that the great majority of subscriber drops between 1985 and 1992 involved secondary stations in a community. As discussed above, these stations tend to offer instructional or minority interest programming and to serve unserved and underserved segments of their communities. Feldman Decl. ¶ 17.

New evidence from the station witnesses confirms that cable households lost diverse information sources in the absence of must carry. For example, many Oklahoma students did not participate in KRSC's distance learning programs until the station was added to numerous cable systems after 1992. Smith Decl. ¶ 12. The sudden shift of WNPB's signal to a higher channel in Morgantown, West Virginia occurred in the midst of the station's instructional schedule, leaving nearly 4,000 students without access to WNPB's instructional programming until the station succeeded in having the shift reversed. Lewis Decl. ¶ 11. This additional evidence merely reinforces Congress' determination that must carry will further the government's interest in the dissemination of a multiplicity of information sources.

B. The Additional Evidence Confirms That the Must-Carry Provisions for Public Television Stations Are Narrowly Tailored to Serve the Government's Interests.

The additional evidence presented by the federal defendants and by the commercial broadcasters in their briefs demonstrates the limited impact must carry has had on the cable

industry, as well as why various alternatives to must-carry are not sufficient to serve the important government interests underlying must-carry. The public broadcasters hereby incorporate and rely on the arguments of the other defendants on these points.

In addition, Mr. Brugger's declaration confirms that Section 5 incorporates features that were designed to alleviate the burden that must-carry otherwise might impose on cable companies. As explained in the declaration, in early 1990 Mr. Brugger, President of APTS, met with James Mooney, President of NCTA, to discuss a legislative proposal that would provide must carry protection for public television. Under APTS's proposal, the number of public television stations to be carried was to vary with the channel capacity of the cable system, thereby limiting the burden on cable operators. Mr. Mooney nevertheless expressed several concerns about the proposal, and Mr. Brugger responded by modifying the proposal to address those concerns. Mr. Brugger inserted a provision stating that cable operators with a channel capacity of 36 or fewer channels would be required to carry only three public stations (with limited exceptions). He also added a provision that cable operators could use PEG channels (see page 50, supra) to carry public television stations they were required to add as a result of must-carry. Brugger Decl. ¶¶ 29-30 & Ex. 9.

Once Mr. Brugger had made these changes to accommodate NCTA's concerns, Mr. Mooney submitted the agreement to the NCTA Board.⁹⁹ After Mr. Mooney advised that the NCTA Board had given its approval, the two organizations jointly recommended that Congress enact the agreed-upon language. Brugger Decl. ¶ 31. The proposal was immediately introduced as H.R. 4415 by Representatives Dingell, Lent, Markey, and Rinaldo. Id. Ex. 11. Although must-carry legislation was not enacted in 1990, the NCTA-APTS proposal was reintroduced in virtually the same form and was eventually enacted as Section 5 of the 1992 Cable Act.¹⁰⁰

Thus, the requirements of Section 5 reflect the outcome of a process of negotiation, in which the cable industry demanded and received modifications to accommodate its concerns and agreed to the legislative proposal after its concerns were satisfied. This negotiating history confirms that Section 5 is narrowly tailored to minimize burdens on cable companies while serving the important governmental interests that underlie must-carry.

⁹⁹ See tab T of Volume 5 of the Appendix to this memorandum (document number N0013918-20).

¹⁰⁰ As explained in Part I.B.3 above, the only substantive difference between Section 5 and the 1990 agreement was the addition of a channel positioning requirement in Section 5.

CONCLUSION

The congressional record establishes that there is substantial evidence to support Congress' conclusion that Section 5 advances important government interests and that the provision is narrowly tailored to serve those interests. The Court should therefore grant summary judgment upholding the constitutionality of Section 5. To the extent the Court finds it necessary to consider evidence outside the congressional record, that evidence demonstrates even greater support for Congress' determinations and requires the grant of summary judgment for the public broadcasters.

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